MINUTES
BOARD OF ADJUSTMENT
THURSDAY, SEPTEMBER 13, 2012
HOOD ROOM, MATTHEWS TOWN HALL

PRESENT: Chairman Eric Welsh, Vice Chairman Stephen Lee, Members Jim Mortimer and Walter Monestere; Alternate Members Jim Jiles and Jeanne Moore; Attorney Robert Blythe; Planner Jim King and Zoning Technician/Deputy Town Clerk Lori Canapinno

ABSENT: Member Derek Morgan, Alternate Member Cecil Sumners

CALL TO ORDER/INVOCATION

Chairman Welsh called the meeting to order at 7:00 pm and gave the invocation.

Board attorney Robert Blythe explained that this meeting involves a court case between Premier Plastic Surgery and the Town of Matthews Board of Adjustment (Board). This is a remand from Court of Appeals to Superior Court to remand back to the Board of Adjustment to make decisions in accordance with that opinion. New arguments will be made but no new evidence will be presented.

Chairman Welsh noted that Ms. Moore will act as a voting member.

ARGUMENTS

Attorney Norris Adams represented Doctor Victor Ferrari, Premier Plastic Surgery and Genesis Ventures, LLC and addressed the Board. At question is a sign located at 1635 Matthews Township Parkway. He displayed enlarged photographs, copies of which are included in the briefing documents prepared by staff and incorporated herein by reference.

The property was zoned as a multi-lot development. Premier Plastic Surgery is located in the first lot. The second is a multi-tenant facility that currently houses Space Kidets [sic] and $1.99 Dry Cleaner. The third houses Fuddruckers and the fourth houses a Chinese buffet.

From the record, from memorandums written by Kathi Ingrish from the early 1990s, it appears that the reason these lots were put together was to limit the number of drives onto Highway 51. A regulation was enacted to require two acres or for property to be part of a multi-lot development in order to have a drive. Initially there was only one driveway. The second didn't come until much later. That is how Premier Plastic Surgery ended up with these previously-mentioned businesses as part of the same development.

Fuddruckers opened in 1995 and they installed a monument sign. The second drive was developed at some point. There is about five hundred feet between the drives with a curve in between. One cannot see the monument sign or first drive from the second drive and vice versa – they are totally invisible from each other.

Dr. Ferrari realized there was an issue with his practice. He didn't have a sign and had no means of being identified from the parkway. In late 2006 Dr. Ferrari's wife met with Town staff to discuss the construction of a sign

outside his practice. She was informed that it was not okay to put a sign out there. Dr. Ferrari then hired Comco Signs – a sign company that has been in business for a while now - to determine if a sign could be placed on the building. That is an important distinction because at least from the 2007 hearing notes there was a lot of discussion about whether or not Dr. Ferrari was trying to usurp this Board. Mr. Adams said he does not believe that to be true – the record indicates Dr. Ferrari was told he couldn't put a sign outside so he followed up with Comco to see if he could put a sign up on the building instead.

Due to the architecture of the building and the fact that Matthews requires a number of trees between the parkway and the building, there is no way for a sign on the building to be visible from Matthews Township Parkway. The Vice President of Comco suggested to Dr. Ferrari that a monument sign would work. Dr. Ferrari told him that he didn't believe the Town would allow it and the Comco agent said he was the professional, that he thought they would and asked Dr. Ferrari to allow him to see what could be done.

On April 4, 2007, Mecklenburg County Zoning Inspector CJ Butler issued a sign permit for a monument sign. About two and a half months later, Comco constructed a monument sign for a little over $7,200 and erected it outside of Dr. Ferrari's medical practice. In fact, the Mecklenburg County Inspector was on site the day the sign was installed and even directed the placement of the sign. The sign is actually five feet farther back than it had to be – farther out of the sight line that what is required under the code. Mr. Butler was there and directed the placement. About a week later the sign permit was revoked. The reason given was that it had been issued in error and that the placement of the sign violated section 153.144(A) of the Matthews Zoning Code, which limits monument signs in a multi-lot development to only one.

Dr. Ferrari appealed the revocation of the permit and was denied in November 2007. He then filed an application for a text amendment as suggested by the Board. He worked with Town staff on the language but that too was denied by the Board of Commissioners in April 2008. Dr. Ferrari then requested a variance to section 153.144(A) to be allowed to keep the sign in place but that was denied by the Board of Adjustment in July 2008. Dr. Ferrari filed a Writ of Certiorari to the Mecklenburg County Superior Court, which granted it and reviewed the case. The Superior Court affirmed the Board's decision in January 2010. Dr. Ferrari appealed that decision to the North Carolina Court of Appeals. In July 2011, the Court of Appeals reversed that decision in part and remanded in part back to the Board of Adjustment.

The attorneys involved concluded that the North Carolina Court of Appeals concurs that the Board of Adjustment has the right to issue a variance for this sign in this case. In addition, the Court of Appeals has told the Board that it needs to reconsider the evidence that was presented to the Board in 2008, make appropriate factual findings based on the evidence and render a new decision on the question of whether or not to grant a variance.

Mr. Adams dispersed proposed findings of fact to the Board (Exhibit #1 hereby referenced and made a part of these minutes) and said there were nine evidentiary areas to be discussed.

The first deals with the issue of medical emergencies. Dr, Ferrari performs surgery onsite. He testified that he is extremely concerned because people are being put under general anesthesia and are at risk for asthma attacks, heart attacks and similar medical emergencies. If something like that occurred, immediate medical attention is required. Dr. Ferrari has some equipment available onsite but the patient would have to be transported via ambulance to a hospital. His concern is that without outside identification it will be difficult for ambulances to reach the location in time. A delay of two or three minutes could mean the difference between life and death. That concern is what has driven this case for six years.

The first proposed finding of fact from that concern is this: absent this sign, the ability to adequately treat and respond to medical emergencies arising during onsite surgery may be compromised by the inability of paramedics to promptly respond.

The second piece of evidence also deals with medical emergencies but in reverse: Dr. Ferrari gets referrals from other physicians. The example he gave in previous testimony was a pediatrician for things like animal bites suffered by children. Dr. Ferrari's practice consists of approximately 10% of this type of non-elective surgery. If time is lost in treating a situation like that, additional infection, blood or tissue loss, inability to close wounds, worsening of the condition and added stress and anxiety may occur. That 10% non-elective surgery is a significant issue, even if it's only one animal bite per year.

The second proposed finding of fact is this: absent this sign, the health and safety of citizens in Matthews in need of urgent medical attention may be compromised by the inability to transport them to the medical practice for emergency care.

It's not just medical emergencies. Dr. Ferrari also testified to the impact that not having the sign would have on his business. His testimony was that patients routinely had trouble locating the medical practice; they'd drive past the entrance and have to double back and keep circling around in an attempt to find it. He testified that approximately 90% of first-time patients experienced the problem and were over thirty minutes late as a result. This backed up other appointments and threw his practice into disarray. It became hard to run an office.

The third proposed finding of fact is this: absent this sign, patients routinely had trouble locating the medical practice, and as a result would often be over thirty minutes late, backing up other appointments and disrupting the medical practice.

Mr. Adams indicated several of the displayed photographs. He noted there had been evidence presented about similar sign usage in the area, which goes in relevant part to the sign ordinance's concern with everything being in harmony with each other and not having clumps of individual signs with a multi-tenant development. The area around Dr. Ferrari's property and the entire multi-tenant unit is consistent, in Mr. Adams' point of view, to having a monument sign five hundred feet down and around a curve from a second monument sign. On one side of the property in question is an apartment complex called Paces Commons. They have four signs on one drive. On the other side is a multi-tenant sign with a monument sign approximately twenty feet in front of it – at least four hundred fifty to four hundred eighty feet closer to the monument sign than is the case for the subject property. Looking across the street one can see that Presbyterian Hospital has two entrances and each has a monument signs. No one should have a problem with that since people need to be able to find the hospital when they have a medical issue and it's the same concept with Dr. Ferrari's property. There was plenty of evidence presented before that Dr. Ferrari's sign doesn't stand out and doesn't cause any sort of disparate impact on the surrounding properties. In fact, none of the adjoining property owners showed up to the meeting after they were notified as required, so there doesn't seem to be a real issue with that. In 2007, Vice Chairman Lee stated, "…personally, it's a nice sign and I think it's a good addition to the area."

The fourth proposed finding of fact is this: the sign usage on this property is similar to and otherwise consistent with the approved sign usage located on the nearby and adjacent properties.

The fifth piece of evidence is the undue hardship/preventing injustice element of this case. That is a concern that is in the zoning ordinance. Dr. Ferrari spent over $7,200 on this sign, but before he spent that money, he relied on the system that's in place. He relied on the professional sign company, he relied on the sign permit he received from Mecklenburg County, he relied on the government employee who issued the sign permit, he relied on the passage of two and a half months, any time during which the sign permit could have been revoked and he would

not have been out $7,200 and he relied on the fact that there was an actual County official there to direct the placement of the sign. Mr. Adams quoted Ms. Moore from the record: "…as a layperson, how far do you have to go to prove that you're doing the right thing? We're supposed to be working together. We all have different businesses. Dr. Ferrari relied on another company and he relied on the County. He was told it was okay. How far does a person have to go to prove that everyone we deal with day in and day out is telling us the right thing...he was told he could have a permit." Mr. Monestere said, "…this confusion was caused by Mecklenburg County. The petitioner went in good faith to get a sign permit and then it got revoked." Mr. Morgan said, "Mr. Butler was on site the day they put up the sign. Sometime later he corrects his error and sends out a letter of revocation. If you are on the site with me and tell me where I can put the sign, I assume I'm doing the right thing." The North Carolina Supreme Court states that an important goal of any Board of Adjustment is to issue a variance when it will alleviate hardship or when substantial justice will occur and these are the kinds of things that they mean.

The fifth proposed finding of fact is this: Dr. Ferrari's reliance upon a professional sign company, a sign permit issued by a government official, the passage of two and a half months without any issues and the presence and additional guidance of the government official before investing in and placing the sign was reasonable.

The sixth grouping of evidence pertains to financial hardship that removing the sign will cause. Dr, Ferrari procured the land, built the building and installed a $300,000 operating room in it. He testified that it would be very difficult to sell the property without a sign outside. That's a huge investment for property that he can't viably sell. He also testified in 2008 that he'd been having difficulty procuring a tenant for the extra space in his building due to the uncertainty regarding the future of the sign. The Board should consider that he wasn't able to rent to a tenant because there was no assurance regarding to the sign. That extra space is now being used as storage. There is also the economic waste that he would incur to demolish and remove the debris of a $7,200 sign. Those are out of pocket costs that don't account for the loss of business that was discussed earlier. The current economy is not the time to create further economic waste and unnecessary hardship on a taxpaying company in Matthews. The result of Dr. Ferrari having to take down the sign will cause financial hardship to him and his medical practice.

The sixth proposed finding of fact is this: absent this sign, Dr. Ferrari will incur numerous financial hardships.

The seventh piece of evidence is that Dr. Ferrari has no options other than this sign. The existing multi-tenant monument sign is a first-come, first-served situation according to Mr. Camp in the 2007 record. The first tenant in there – Fuddruckers - got to place the monument sign in 1995. After that came the buffet restaurant and the strip that houses Space Kidets and Dry Clean City. Dr. Ferrari didn't appear until 2005. The sign is where it is but it's five hundred feet or more from Dr. Ferrari's location. He can't get added to the existing monument sign and the monument sign can't get any bigger. Aside from that, even if he could use the existing sign, it might not make sense to do so. In order to get to Dr. Ferrari's business from that entrance, one must travel through the Fuddruckers parking lot, down a ramp, turn left at the Chinese food restaurant, go through a somewhat wooded area, go up another ramp and across another multi-tenant lot before taking another right to reach Dr. Ferrari's building. Mr. Adams said he is not sure that an ambulance that pulled into the entrance at the existing monument sign could get to Dr. Ferrari any faster, so it wouldn't make sense to try to get Dr. Ferrari's sign on the existing monument.

The seventh proposed finding of fact is this: absent this sign, Dr. Ferrari will have no other viable options to identify his medical practice through signage to emergency personnel, patients or the public.

The eighth piece of evidence references some unique historical facts relevant to the Board's decision-making process as to whether granting the requested variance is an appropriate use of the Board's power. Initially there was only one driveway into the development. According to Planning Director Kathi Ingrish's memorandum, when

Highway 51 was built there was a strong desire to limit the number of drives on it. Per Mr. Camp's staff report, the purpose of the sign ordinance is to reduce clutter by disallowing individual signs for businesses that are part of a multi-tenant property. But when one considers that concern along with the concern as to why Premier is lumped in with these other properties, it's because in 1990 Matthews didn't want to have a bunch of driveways on Highway 51. Then later a second driveway got put in. The only reason Premier is with them, really, is because of that requirement that was mean to prevent a lot of driveways onto Highway 51. Since an additional driveway now exists, the concern is moot. Mr. Adams quoted a comment from Ms. Moore from the 2008 meeting minutes, "…the road has changed, the population has changed...I'm not so sure the Town is keeping up with the times." That is in the record – before there was a reason to keep the multiple tenants to one driveway, but now there are two drives and really no reason to force a medical practice that is not visible from the rest of the tenants into the same multi-tenant monument sign.

The eighth proposed finding of fact is this: the addition of the second drive has rendered moot prior concerns about the number of access ways to Highway 51 that previously caused Premier to arbitrarily be lumped together with other retail establishments, and as such has eliminated the primary concern against allowing this sign.

The ninth and final piece of evidence deals with the unique geographic makeup of the property. There was evidence offered regarding the curve. Mr. Camp testified that there was approximately five hundred feet between the two driveways. It's a multi-tenant property but they're not close to each other – they're down the street. The curve of the road and the fact that the speed limit is 45 mph makes things difficult. Mr. Adams quoted Mr. Monestere from the 2008 meeting minutes, "…with the curvature of the road and the speed limit of 45 miles an hour, the sign is the only way to locate Dr. Ferrari's office." He quoted Ms. Moore, "…you can't see it when you go down the road and as traffic goes by quickly." Mr. Adams said the geographical layout allays the concern of the sign ordinance that protects the town from over-signage, clutter and the like. The area is further unique in that it might be a greater hindrance to the stated purposes of the sign ordinance to help with traffic flow – it wouldn't be any better to have an unmarked driveway in a major commercial highway. Cars would slow down and get confused and could potentially become a bigger issue than simply having two signs located five hundred feet down the street from each other.

Mr. Adams said that is the evidence he pulled out from the existing record. The Court of Appeals affirmatively resolved one question regarding the authority of the Board of Adjustment to grant a variance for this sign at this time if it so chooses. Additionally, he believes the Court of Appeals went further than that. On page ten of the Court's opinion, it states, "…it is apparent the ordinance was also intended to provide means for adequate and effective signage, prevent driver confusion and allow for flexibility to meet individual needs for business identification - the very problems of which Petitioners complain." He said a variance here is appropriate under these specific circumstances and given the seven stated purposes of the Matthews sign ordinance, and that a variance is an appropriate and effective use of this Board's power.

Chairman Welsh noted that Mr. Adams quoted from page 10 of the Court of Appeals ruling. The Chairman asked Mr. Adams if he would agree that what the Court of Appeals was really saying - in the language referring to the allowance for flexibility to meet individual needs for business identification - was actually referring to the part of the code that permits the Board to act on a variance request. Mr. Adams disagreed. Chairman Welsh said he believed it referred to the Superior Court and whether it was contrary to the zoning ordinance, not speaking about whether or not the Board of Adjustment should or should not grant the variance. Mr. Adams said the Court of Appeals definitely ruled that the Superior Court was wrong and that the Board of Adjustment can in fact issue a variance. His reading of the sentence is that when one looks at these things that are clearly purposes of the statute, they are the exact things that the applicant is saying in the evidentiary record are the problem.

Attorney Charles Buckley represented the Town and dispersed a hearing memorandum to the Board (Exhibit #2 hereby referenced and made a part of these minutes).

Mr. Buckley said he would point out issues based on facts in the record and then link those facts in evidence to the parts of the Board of Adjustment regulations under the Matthews town code. He agreed that the Board has the right to grant a variance in this case if it chooses and the right to not grant it a variance if it chooses. He also said he agreed with Chairman Welsh's reading of the Court of Appeals decision, that the errors of law were with the Superior Court and not whether or not the Board of Adjustment should issue the variance.

This was not an arbitrary placement of a zoning district. It is a multi-lot unit development. It is not bypassed by time, contrary to one of the proposed findings as stated by Mr. Adams. It would not be arbitrary to keep those standards in place – they are how the businesses got here in the first place. That type of evidentiary finding is conjecture. Mr. Buckley reminded the Board that the Court of Appeals has indicated that the Board cannot base its findings of fact on matters that were not presented into evidence and that there had been conclusionary statements that were insufficient to support the Board's decision where they were not in the evidence themselves. Additionally the Court stated that the decision must be supported by evidence and that the Board cannot rely on conjecture. He said he believed that most of the findings presented by Mr. Adams are based on conjecture. Relying on those matters submitted by Mr. Adams as matters of opinion or conjecture would place the Board back in the same position it is currently in on an appeal.

Mr. Buckley said he would examine the evidence in the form of arguments and conclusions. The first argument is that the petitioner made the business decision not to utilize the signage he had available as a matter of right. There is a monument sign for the unified development. The development has maintained the same standard for every property owner within that development. The property was acquired with that knowledge of the signage regulations that applied to the development.

Dr. Ferrari went on to say that without the sign, his patients couldn't find the building and circled around. Mr. Buckley pointed out that when further questioned, Dr. Ferrari stated that he had not bothered to explore the use of the current development monument sign – a sign that he has the right to utilize. He could put a panel on the sign just like the other businesses within the unified development, but he hadn't bothered to explore that option. There was even some indication in the record that Mr. Camp had pointed out that there may be incidental signs that could be placed within the unified development that would give direction to Premier Plastic Surgery. He has certain rights of signage that he hasn't bothered to explore, so where is the hardship? The hardship is at least partly caused by the action of the owner.

This results in the conclusion that the difficulty or hardship that has resulted, if any, has not resulted strictly from the provisions of the sign ordinance but does include the actions of the owner and/or previous owners of the property. Business decisions are making a contribution to the problem here.

The second argument is that there is no evidence that the provisions of the sign chapter would prevent the owner from securing a reasonable return or making a reasonable use of the property. Mr. Buckley quoted from the 2008 minutes, "Dr. Ferrari stated that he would not have a problem selling the property to another physician who wanted to perform office-space surgery." Then, when asked if he felt that he would not get a proper return of the property value if he were to sell the property, Dr. Ferrari avoided answering the question by saying only that it would be a lot more difficult to sell the property without the sign.

This results in the conclusion that there is no evidence to support the premise that difficulty or hardship resulting from the application of the provisions of the chapter will prevent the owner from securing a reasonable return form or make reasonable use of the property, nor can there be any finding of such.

The third argument asks about the petitioner's hardship. Dr. Ferrari stated that his business was about 90% elective versus emergency and that he did not know of any materially adverse effects to anyone in the remaining 10% who had to drive through the lot during an emergency. These are factual matters, not conjecture or opinion or fear of matters that may happen in the future. Dr. Ferrari further stated that in the months of his business operation prior to the installation of the sign, there was no situation in which an ambulance was unable to find the property. That testimony was given in the 2008 meeting.

This results in the conclusion that there is no evidence to support the premise that hardship exists. Is the hardship a matter of patient convenience? In Mr. Buckley's opinion, patient convenience is not a reason to grant a variance. Any other matters in the record are conjecture as to what may or may not happen, since there is no evidence of anything happening.

The fourth argument relates to the issue of public health, safety and welfare and the assurance that substantial; justice is done. That is a part of the question of whether or not the Board may grant the variance or not, but there is no better evidence than the fact that the Town Board of Commissioners, in dealing with this very sign, denied the zoning amendment that would have allowed the sign. The Town's legislative decisions, which includes the Board of Commissioners' adoption or non-adoption of a zoning matter or text amendment, is determinative of the general health, safety and welfare of the community.

This results in the conclusion that the primary evidence of whether or not a variance should be issued is that the legislative body, when dealing with this exact sign during the same time period, determined that it would not be in the general health, safety and welfare to approve a text amendment that would have made the sign in question legal.

The fifth and final argument relates to signs up and down the street. The sign ordinance itself doesn't deal with the number of entrances. The petitioner's argument is that are other signs exist so Dr. Ferrari should be allowed a sign as well. One of the purposes of the sign regulations is to allow for adequate and effective signs for communicating, identification and other messages while preventing signs from dominating the visual appearance of the area in which they are located. The petitioner argued that a plethora of signs exist up and down the street. Mr. Buckley said that is the very purpose of allowing only single signage in a multiple lot development plan.

This results in the conclusion that the evidence supports the reason why the multi-lot single development signage ordinance is in place – to help prevent signs from dominating the visual appearance of the area in which they are located.

Mr. Buckley said he has tried to give the Board matters of fact that are in the record - not matters of opinion, matters of conjecture or matters that are conclusionary in nature – as to why a variance should not be granted. He said he agrees that the Board has the legal right to grant a variance if that is what it desires, but that there were three other things that were decided by the court that were specific and had been brought up in the first two hearings: vested rights, estoppels and laches, which are not present here and are not to be considered. Mr. Buckley said a part of what Mr. Adams has offered as being part of evidentiary conclusions supported by the record have a smattering of vested rights interpretation to them – the hardship of having spent $7,000 and the hardship of a clerk in the County zoning department having approved the permit – and should not be considered because the Court of Appeals decision said they shouldn't be considered. When one looks at the entire record, any hardship that the petitioner may want to argue is the result of a business decision. How does anyone know what the clientele would be like if Dr. Ferrari placed his sign at the existing legal monument sign? He chose to not bother doing that.

Mr. Buckley also said he gives more credit to the Town's public safety officers for knowing locations in Matthews and they wouldn't become confused when finding his office. Mr. Buckley admitted that that was conjecture but said it is a pleading argument to say that ambulances can't find his place of business. These are business decisions made by Dr. Ferrari and regulations regarding the issuance of variances state that the hardships shouldn't have been caused by the owner. Mr. Buckley stated that for these reasons, the Board of Adjustment should not grant the requested variance.

Chairman Welsh asked for clarification regarding the issue of vested rights. In his argument Mr. Buckley said that the facts heard at the previous hearing regarding actions that lead to getting the sign permit - conversations with Town staff, emails and that sort of thing – are not to be considered because they concern vested rights. Mr. Buckley said the Court said the Board is not to consider the revocation of the permit and everything that lead up to that since there was no vested right to it.

Mr. Mortimer asked if the petitioner could put a sign up on the legal monument sign with all the other tenants. Mr. Adams said the record indicates that the monument sign is completely full and can't be made any bigger in area. Mr. Camp had said the petitioner was free to negotiate with the current tenants to see if some room could be made for him by reconfiguring the existing placards.

Chairman Welsh said the Board heard in Mr. Adams' argument that the roads have been reconfigured and access has been changed with the addition of another drive into the complex. He asked what the Town's position is on the impact of this and the issuance of a variance. Mr. Buckley said he believes the second entrance has no impact. The sign area in toto must be looked at – the whole street. That is the way the regulations look at it. Section 153.140 states in part that the purpose of the ordinance is to allow for adequate and effective signs for communicating identification and other messages while preventing signs from dominating the visual appearance of the area in which they are located. The number of entrances now has nothing to do with the signs in the area. The very reason why there is a single monument sign requirement for multi-lot developments is so signs don't proliferate up and down the street.

Mr. Mortimer said there are a couple of currently empty spaces in the property, and he said from what he heard in this meeting it seems like any new tenants would not have the ability to put their own sign on the existing monument. Mr. Buckley said the record indicates that they could explore the opportunity to negotiate for a reconfiguration of the existing monument sign.

Ms. Moore asked if there was room for Dr. Ferrari on the existing monument sign at the time that he made the request for his own sign. Mr. Buckley said he did not know the answer to that question. Ms. Moore asked if not, then why was the second drive put in place. Mr. Buckley said the Town was not the entity that put the second drive in – that information is not in evidence in the record. Chairman Welsh noted that the evidence shows that there is a road that goes by Dr. Ferrari's offices into the complex, but the record does not establish who created that road. He instructed the Board to not to consider Mr. Buckley's previous comment that the Town did not install the road since that is not in evidence.

Mr. Adams addressed Ms. Moore's question regarding whether or not there was space available on the monument sign when Dr. Ferrari moved in. He noted that the record doesn't say exactly whether there was or not, but it does say that Fuddruckers came in 1995, the Chinese buffet came in 1998 or 1999, Space Kidets and the dry cleaner came in the early 2000s and no later than 2004, while Premier Plastic Surgery came in 2005. That is the evidence in the record and it is clear that Premier was last to arrive. He said his assumption is that the sign was as full back then as it is now. Chairman Welsh said that would be conjecture. Mr. Adams said there is evidence regarding the order of each business' tenancy and which businesses have space on the sign now. Mr. Buckley said there is evidence that Dr. Ferrari made no effort to try to find out if he could put a panel on that sign.

Mr. Adams disagreed and said the record indicates he didn't look into it because he was concerned with how far away it was, not that he was just unconcerned about it. The full testimony dealt with the issue of the sign being 500 feet away from his property and around a curve. That is stated in the 2008 meeting minutes.

Chairman Welsh asked if a variance was granted and Dr. Ferrari was to later sell the business, would the new owner be permitted to make changes to the sign. Mr. Blythe said that would be permitted since the change of ownership allows for content change, as long as the variance was granted for the sign itself and not the text on the sign.

DELIBERATIONS

Chairman Welsh explained that the Board has heard from both sets of counsel. The Board now is tasked with coming up with findings of fact and also may grant or not grant a variance. Mr. Mortimer asked if the Board could grant a variance with conditions. Mr. Blythe said the Board has an inherent right to place conditions if they're based on the existing record, unless they're based on conditions that are specifically prohibited.

Mr. Mortimer said he is a bit bothered by the fact that Dr. Ferrari does not have the right to place a sign on the existing legal monument, so the only sign he is allowed is the sign on his building, which people drive by rapidly in traffic. There is opportunity to put signage inside the lot, but someone would have to give up part of their space on the monument sign for him.

Ms. Moore said there isn't any more room on that sign and Dr. Ferrari made a good faith effort to put a sign on his building. She said she believes he needs a sign out there since the building isn't visible. Chairman Welsh said discussion must be focused on the evidence in the record.

Vice Chairman Lee said he is a strong proponent of adhering to ordinances and he knows that the Board grants variances based on circumstances and evidence presented. He heard the Town's evidence and findings of fact and said that was the basis for a lot of the original discussion. The original decision was not an easy one, and he still believes it's a decent looking sign. Having said that, he said he knows that his findings of fact were based on the content of the minutes. He said he did not hear evidence tonight to change that. There had been decisions made in purchasing the property and what was disclosed, and perhaps the sign contractor has been dishonest. There is evidence that the Town said a monument sign could not be put up. He does not disagree with the idea that drivers can't see a sign coming around that curve, especially at 45 mph.

Mr. Monestere said he made his decision the first time due to the testimony that Dr. Ferrari didn't want to place a sign on the main signage near Fuddruckers. It's true that it's hard to see.

Chairman Welsh said he voted to deny the variance last time. He said the petitioner makes a lot of good arguments but the problems he sees now are the same problems he saw back then. The Town has highlighted the fact that there has to be evidence and not conjecture regarding what might be or what could be. Even in the proposed findings, Mr. Adams uses the word *maybe*. Chairman Welsh said he did not hear evidence that there actually were these problems, and Mr. Buckley articulated that well. There is nothing in the record to indicate that ambulances could not find Dr. Ferrari's business or that people who needed to get there quickly had not been able to do so. Mr. Adams had invited the Board to speculate and Chairman Welsh is not prepared to speculate on those things. There The Board knows there are limitations on what it can and cannot do and it knows there are requirements that must be met in order to grant a variance. Dr. Ferrari had an opportunity to present evidence at the time of the original hearings but Chairman Welsh does not see it in any significant way.

Mr. Blythe said the Board should go through the factors relevant to the issuance of a variance and requirements for findings while citing the specific evidence in the record.

Chairman Welsh read item one (a) of the factors relevant to the issuance of a variance: *there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance. If Dr. Ferrari complies with the provisions of the ordinance, will he as property owner secure a reasonable return from or make reasonable use of his property. It is not sufficient that failure to grant the variance simply makes the properly less valuable.*

Chairman Welsh cited page 128, paragraph 1, in which Dr. Ferrari testified that he "…wouldn't have a problem selling the property to another physician who wanted to perform office space surgery." On page 133, paragraph 2, it states he was asked if he were to sell the property, would he get the proper return on the property value, and his answer was that it would be a lot more difficult to sell the property without the sign, so it really wasn't an answer and highlights the lack of evidence put in by the applicant on that point.

On page 128, paragraph 6, Dr. Ferrari confirmed that he opened the location in October 2006 and had operated there without a monument sign from October 2006 through June 2007. Paragraph 9 indicates that he saw patients during that time.

Chairman Welsh said there is a lack of evidence to support the idea that difficulty or hardship resulting from the application of the provisions of the chapter will prevent the owner from securing a reasonable return from or make reasonable use of the property.

Chairman Welsh read item one (b) of the factors relevant to the issuance of a variance: *the hardship of which the applicant complains results from unique circumstances related to the applicant's land. Note: hardships common to an entire neighborhood resulting from overly restrictive zoning regulations should be referred to the Planning Board. Also, unique personal or family hardships are irrelevant.*

Chairman Welsh stated that Dr. Ferrari's business is located on a curve which is perhaps unique to his location. However, all of the properties in the area are subject to the same requirements of the Highway Overlay Plan and the same signage requirements. There is no evidence in the record that would support the view that Premier Plastic Surgery has been arbitrarily lumped together with other retail establishments and that somehow eliminates the need for the ordinance.

Chairman Welsh read item one (c) of the factors relevant to the issuance of a variance: *the hardship is not the result of the applicant's own actions.*

Chairman Welsh cited page 102, which states that the Highway Overlay Plan, which includes the ordinance at issue, was enacted prior to Dr. Ferrari's actions to erect a monument sign on his property.

Vice Chairman Lee cited page 88, which is an email in which Jay Camp notifies Dr. Ferrari about the need for adding his business to monument signage for the development. Chairman Welsh added that page 131, paragraph 4, Dr. Ferrari was asked about the option to use the existing monument sign and Dr. Ferrari testified that he hadn't bothered to try to negotiate with the owner of the sign to reconfigure it to get space for his business. That is a decision he made when he decided instead to erect his own monument sign.

Chairman Welsh read item two of the factors relevant to the issuance of a variance: *the variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit.*

Chairman Welsh said the facts show that the purpose of the ordinance is to reduce sign clutter in the town. That is why the ordinance was created in the first place. Evidence was presented - examples of which are located on pages 143, 144, 147, 148 and 149 – showing different types of signage in this general area which sets the basic fact that there are quite a lot of signs. Dr. Ferrari's sign, which is depicted on pages 136 though 138, would be an additional sign to the ones that are already located as previously referenced. This would be an additional sign. No evidence has been presented to indicate that granting the variance to allow the sign to remain would be in harmony with the general purpose and intent of the ordinance, which is to maintain proper signage for common developments with the type of sign as depicted on page 140 as an example. There is no evidence to show that the variance would be consistent with the purpose of maintaining that sort of monument sign for the common area and also to reduce the clutter caused by additional signage.

Chairman Welsh read item three of the factors relevant to the issuance of a variance: *the granting of the variance secures the public safety and welfare and does substantial justice.*

Chairman Welsh stated that the Board heard Mr. Adams' argument that given the nature of the medical practice, granting the variance may provide some public safety benefit for ambulances and others to find his location quickly. Chairman Welsh said he has not seen evidence on the record to support that assertion, only conjecture and speculation of counsel on that point. He cited referred to previous testimony in which Dr. Ferrari testified that 90% of his practice was elective and as for the remaining 10%, he was unable to testify as to any materially adverse effects to anyone who had to drive through the lot during an emergency.

Chairman Welsh also cited page 128, paragraph 9, in which Dr. Ferrari testified that during the months before the sign went up there were no situations during that time in which an ambulance was unable to find that property. Vice Chairman Lee cited page 125, paragraph 2, that an alternative to a variance was to obtain a text amendment of the ordinances to allow the signage. That text amendment went before the Planning Board and Board of Commissioners, resulting in denials from both. These Boards create the ordinances, set the standard and evaluate the institutional ordinances based on health, safety and welfare.

Referring back to the hardship finding, Chairman Welsh cited evidence on page 81 regarding the common driveway access to the development. Also with respect to the findings of the uniqueness of the land, Chairman Welsh referred to the site plan documents themselves on pages 103 through 119, which note that the property is subject to the ordinance at issue with the common signage. Page 119 includes the note that reads, "Site signage to conform to unified development plan and will be a shared sign with four properties in the unified development plan." The date is referenced on page 114 – the site plan is dates January 20, 2005 and was approved on May 30, 2005.

Chairman Welsh said there is no evidence in the record regarding the amount of money that would be required to remove the sign, which goes to the issue of financial hardship and reasonable return.

Vice Chairman Lee added clarification to the issue of uniqueness. He noted that the variance runs with the land, not the building, so despite what the structure has been built for the variance runs with the land. The current use is not necessarily going to be the future use, but in the evidence it was presented by the petitioner as if the building was only going to be used for in-house surgical operations.

Chairman Welsh made a motion to deny the requested variance. Vice Chairman Lee seconded. Motion to deny passed on a vote of 4-1 with Ms. Moore opposed.

ADJOURNMENT

Chairman Welsh made a motion to adjourn. Vice Chairman Lee seconded and the meeting adjourned at 9:17 pm.

Respectfully submitted,

Lori Canapinno
Zoning Technician/Deputy Town Clerk